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IN THE

Supreme Court of the United States

KHALED A.F. AL ODAH, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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[redacted] BRIEF OF JUVENILE LAW CENTER, *et. al.* AS *AMICI CURIAE*, AND BRIEF OF JUVENILE LAW CENTER *et. al.* IN SUPPORT OF RESPONDENT OMAR KHADR

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MOTION FOR LEAVE TO FILE BRIEF OF JUVENILE LAW CENTER, *et. al.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT OMAR KHADR

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States Juvenile Law Center, *et. al.* hereby requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit. Petitioners and Respondents Khadr and Khalid have consented to the filing of this brief. Counsel for Respondent President Bush has also consented to our request for consent.

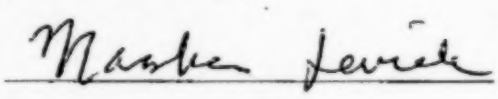
1. Juvenile Law Center (JLC), one of the oldest public interest law firms for children in the United States, was founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies: for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. More detailed information about JLC is available at www.jlc.org.
2. JLC works to integrate juvenile justice practice and policy with knowledge of adolescent development. JLC has edited several publications on this topic, including *Understanding Adolescents: A Juvenile Court Training Curriculum* (L. Rosado, American Bar Association Juvenile Justice Center, Juvenile Law Center, Youth Law Center 2000); *Youth on Trial: A Developmental Perspective on Juvenile Justice*, an examination of the impact of the legal

system on adolescent development and psychology published in 2000 (Thomas Grisso and Robert G. Schwartz, University of Chicago Press). JLC has also used knowledge of adolescent development to inform its contributions in two recent amicus briefs to this Court: *Roper v. Simmons*, 543 U.S. 551 (2005) (regarding the constitutionality of the death penalty for minors aged sixteen and seventeen at the time of their crimes) and *Yarborough v. Alvarado*, 124 S.Ct. 1706 (2004) (regarding whether a minor's age was properly considered when determining if the minor was in custody during a police interrogation).

3. JLC is particularly concerned with juvenile and criminal justice systems and their effect on children's emotional and psychological health. JLC is an active participant in the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, addressing the effects of juvenile and adult incarceration on juvenile offenders.
4. JLC helps to facilitate a national dialogue on juvenile justice issues both by participating as *amici* in cases across the country and conducting trainings at national conferences hosted by organizations such as the American Bar Association, National Council of Juvenile and Family Court Judges, Office of Juvenile Justice and Delinquency Prevention, and the National Association of Council for Children. JLC is also a co-founder, with the American Bar Association and the Youth Law Center, of the National Juvenile Defender Center (NJDC). NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

5. JLC is deeply concerned by the possibility that the alternative process to *habeas corpus* provided for under the Military Commission Act (MCA) may be applied to a juvenile. Congress' silence regarding juveniles in the MCA indicates that Congress never intended for military commissions to have jurisdiction over child soldiers. JLC seeks to establish that federal law consistently differentiates between juveniles and adults. Therefore, it would be illogical to read jurisdiction into a silent statute when juveniles are routinely treated differently by federal law.

Respectfully submitted,



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INTEREST OF *AMICI*[1]

The organizations submitting this brief work with, and on behalf of, adolescents in a variety of settings, from day care to foster care, substance abuse to homelessness, and at every stage of the juvenile and criminal justice process. *Amici* are advocates and researchers who bring a unique perspective and a wealth of experience in providing for the care, treatment, and rehabilitation of youth in the child welfare and juvenile justice systems. *Amici* know from first hand experience that youth who enter these systems need extra protection and special care, clearly necessitated by their status as youth. *Amici* also know from their collective experience that adolescent immaturity often manifests itself in numerous ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. It is precisely for these reasons that *Amici* believe that the status of childhood and adolescence separates youth from adults in categorical and distinct ways and that child soldiers cannot be held to the same standards of blameworthiness and culpability as their adult counterparts.

IDENTITY OF *AMICI*

See Appendix A for a list and brief description of all *Amici*.

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[1] *Amici* file this brief with the consent of Petitioners and Respondents Khadr and Khalid. Counsel for Respondent President Bush has also consented. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

STATEMENT OF FACTS

Amici adopt the statement of facts as articulated in the brief of Respondent O.K.

SUMMARY OF ARGUMENT

Amici support Respondent O.K.'s argument that military commissions convened pursuant to the Military Commissions Act (MCA) lack jurisdiction over O.K. The MCA is silent as to the issue of personal jurisdiction over minors and the military commissions do not provide for a distinct process for juveniles. It would be absurd to impute personal jurisdiction into a silent statute particularly given that federal law consistently accounts for the developmental differences between adults and youth.

It is widely understood that adolescents are categorically different than adults. Both United States Supreme Court jurisprudence and federal legislation reflect this understanding. Moreover, this federal law is complemented by an emerging body of social science research attesting to the developmental differences between adolescents and adults. This scholarship shows that adolescents are more likely than adults to engage in risky behavior; are more likely to consider only the immediate effects of their acts rather than the long-term consequences; and are far more susceptible to being overcome by external pressure from peers and authority figures than are adults, both in terms of how they evaluate their own behavior and in conforming their conduct. The scholarship also shows that because they live in the moment, adolescents feel that they have less of a stake in the future. All told, this recent research illustrates that juveniles as a class are less capable of controlling their impulses than adults, and thus are less culpable than adults.

ARGUMENT

Respondent's brief lays out the analysis establishing that Congress' silence in the MCA presupposes that an enemy combatant subject to military commission jurisdiction must at least be the minimum age to participate in hostilities and join the military force on whose behalf he allegedly fought. The brief establishes that this interpretation is supported by longstanding military law, international humanitarian law, and congressional intent. *Amici* build from Respondent's argument to demonstrate that Respondent's analysis of the MCA is further supported by a broad range of federal law distinguishing juveniles from adults.

United States Supreme Court jurisprudence and federal legislation have consistently accounted for the developmental and social differences of youth in delineating their constitutional and legal rights when they are accused of crimes. But "[i]n detaining O.K., the United States has flouted juvenile justice standards that provide for children to be treated in accordance with their unique vulnerability, lower degree of culpability, and capacity for rehabilitation." *See* Human Rights Watch, Press Release, *US: Move O.K. and Hamdan Cases to Federal Court*, June 1, 2007, http://hrw.org/english/docs/2007/06/01/usdom16050.htm (last visited Aug. 13, 2007). As demonstrated *infra*, the recognition that youth have a "their unique vulnerability, lower degree of culpability, and capacity for rehabilitation" is indeed imbedded in our legal tradition. And the powerful testimony of former Sierra Leonean child soldier Ishmael Beah at the hearings on the Child Soldier Prevention Act of 2007 reminds us of the wisdom of that tradition:

> I wouldn't be alive today if it weren't for the presence of non-governmental organizations that believed that children like myself, due to our emotional and psychological immaturity, had been brainwashed and forced to be killers, and above all, that we could be rehabilitated and reintegrated into society. Healing from the war was a long-term process that was difficult but very possible. It required perseverance, patience, sensitivity, and a selfless compassion and commitment from the staff members at my healing center. Effective rehabilitation of children is in itself a preventative measure and this should be the focus, not punitive measures against children that have no beneficial outcome.

Hearing on Casualties of War: Child Soldiers and the Law Before The Senate Judiciary Subcommittee on Human Rights and the Law, 110th Cong (April 24, 2007) (testimony of Ishmael Beah, Author, A Long Way Gone: Memoirs of a Boy Soldier), available at http://judiciary.senate,gov/print_testimony.cfm?id=2712&wit_id=6387. A holding by this Court that the military commissions convened pursuant to the Military Commissions Act (MCA) lack jurisdiction over O.K would fit squarely within this legal tradition.

I. FEDERAL LAW CONSISTENTLY RECOGNIZES THE DEVELOPMENTAL DIFFERENCES BETWEEN ADOLESCENTS AND ADULTS

A. United States Supreme Court Jurisprudence Consistently Differentiates Between Adolescents and Adults

That minors are different is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, for the last sixty years, this Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights.

For example, this Court has repeatedly noted that minors and adults are different for the purpose of determining the voluntariness of juvenile confessions during custodial interrogation. Thus, the Court has recognized that minors are generally less mature than adults and, therefore, are more vulnerable to coercive interrogation tactics. As the Court admonished in *Haley v. Ohio*, 332 U.S. 596 (1948), a teenager

> *cannot be judged by the more exacting standards of maturity.* That which would leave a man cold and unimpressed can overawe and overwhelm a lad... [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

332 U.S. at 599-600 (emphasis added).

The Court also has noted that minors generally lack critical knowledge and experience, and have a lesser capacity to understand, much less exercise, their rights when they are "made accessible only to the police." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (finding statement taken from a 14-year-old boy outside of his parents' presence to be involuntary). And in *In re Gault*, 387 U. S. 1, 55 (1967), where the Court extended many key constitutional rights to minors subject to delinquency proceedings in juvenile court, the Court reiterated its earlier concerns about youths' special vulnerability: "The greatest care must be taken to assure that [a minor's] confession was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

More recently, in this Court's *per curiam* decision in *Kaupp v. Texas*, 538 U.S. 626 (2003), where it held a 17-year-old's confession must be suppressed following an illegal arrest (absent undisclosed intervening evidence in the record) under the Fourth and Fourteenth Amendments, this Court applied earlier precedents in considering the defendant's status as a 17-year-old in its analysis:

> A *17-year-old boy* was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated Awe need to go and talk..... [The boy's] `Okay' in response to Pinkins's statement is no showing of consent under the circumstances. *Pinkins offered [the boy] no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words `we need to go and talk' presents no option but `to go.'* There is no reason to think [the boy's] answer was anything more than `a mere

submission to a claim of lawful authority.'

538 U.S. at 631 (emphasis added) (citations omitted).[2]

This Court's protective stance toward youth in confession cases parallels its stance in other areas of criminal procedure. For example, the Court has emphasized the juvenile court's core principles of individualized rehabilitation and treatment, noting that youth, because they are still malleable and in development, are more amenable to such rehabilitative interventions than adults. *See McKeiver v Pennsylvania,* 403 U.S. 528, 540 (1971); *Gault*, 387 U.S. at 15-16.

Elsewhere in criminal procedure, the Court's recognition of the differences between youth and adults has led it to uphold practices directed at youth that it would not countenance if directed at adults. For instance, this Court has repeatedly held that the Fourth Amendment strictures may be relaxed when dealing with youth in public schools because youth as a class are in need of adult guidance and control. For example, the Court has sustained the constitutionality of warrantless searches by school officials of students' belongings upon reasonable suspicion that a student has violated school rules or the law, *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). In the same vein, the Court has upheld random, suspicionless drug testing of student athletes,

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[2] *Yarborough v. Alvarado*, 124 S.Ct. 2140 (2004) is not to the contrary. There, the Court held only that youth was not a vital consideration when determining whether an individual is in custody for purposes of triggering *Miranda* warnings prior to interrogation. But *Alvarado* did not disturb this Court's prior precedents that youth is an important factor in assessing the voluntariness of a confession under the due process clause. Moreover, *Alvarado* reached the Court by way of a habeas petition; and pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Court, therefore, only analyzed whether the state court's interpretation of the law in *Alvarado* was reasonable, not whether it was correct. 124 S.Ct. at 2149.

Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 664-65 (1995), and random, suspicionless drug testing of students engaged in extracurricular activities, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 838 (2002).

To support these Fourth Amendment rulings, the Court has observed that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians." *Vernonia,* 515 U.S. at 654 (citation omitted). This echoes the Court's earlier declaration in *Schall v. Martin*, 467 U.S. 253, 265 (1984), in explaining the rejection of a constitutional challenge to the preventive detention of juveniles charged with delinquent acts, that *"juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to care for themselves.* They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae...*" (emphasis added) (citations omitted). *Cf. Vernonia,* 513 U.S. at 655 (when parents place their children in school they delegate custodial power to the latter, permitting the school a degree of supervision and control over their children that could not be exercised over free adults); *T.L.O.*, 469 U.S. at 339 (same).

The Court has endorsed constitutional distinctions between minors and adults outside the context of criminal procedure. In a series of cases involving state restrictions on minors' reproductive choices, the Court has said that "during the formative years of childhood and adolescence, *minors often lack the experience, perspective, and judgment to avoid choices that could be detrimental to them*," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (emphasis added), as well as "*the ability to make fully informed choices that take account of*

both immediate and long-range consequences." *Id.* at 640 (emphasis added); *see also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose *immaturity, inexperience, and lack of judgment* may sometimes impair their ability to exercise their rights wisely.") (emphasis added). For this reason, the Court has held that states may choose to require that minors consult with their parents before obtaining an abortion. *See Hodgson*, 497 U.S. at 458 (O'Connor, J., concurring in part) (the liberty interest of a minor deciding to bear a child can be limited by parental notice requirement, given that immature minors often lack ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (because minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).

The Court also has curtailed the liberty interests of minors in other settings. Particularly illustrative is *Parham v. J.R.*, 442 U.S. 584 (1979), where the Court rejected a constitutional challenge to Georgia's civil commitment scheme that authorized parents and other third parties to involuntarily commit minors under the age of 18. In so doing, the Court stressed that "[m]ost children, *even in adolescence, simply are not able to make sound judgments concerning many decisions....*" *Id.* at 603 (emphasis added).

This Court has distinguished youth from adults under the First Amendment. In *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004), the Court was unanimous that protecting minors from harmful images on the Internet, due to their immaturity, is a compelling government interest. *Id.* at 2792; *id.* at 2801 (Breyer, J., dissenting).[3] And in *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), the Court upheld a state

[3] The Court split only on whether the Child Online Protection Act used the least restrictive means, consistent with adults' First Amendment freedoms, for achieving that end. *Id.* at 2795; *id.* at 2797 (Stevens, J., concurring); *id.* at 2797 (Scalia, J., dissenting); *id.* at 2798 (Breyer, J., dissenting).

statute restricting the sale of obscene material to minors. Such a restriction was permissible for youth, as compared to adults, because "*a child -- like someone in a captive audience – is not possessed of that full capacity for individual choice* which is the presupposition of First Amendment guarantees." *Id.* at 649-50 (Stewart, J., concurring) (footnotes omitted) (emphasis added). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications).[4] Most recently in *Morse v. Frederick*, 127 S.Ct. 2618 (2007) (holding that the principal did not violate student's right to free speech by confiscating a banner she reasonably viewed as promoting illegal drug use) this Court reaffirmed the principle that "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings") (citing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

These themes are echoed in the Court's public school prayer decisions. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the

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[4] Similarly, the Court has upheld a state's right to restrict when a minor can work, on the premise that "[t]he state's authority over children's activities is broader than over like actions of adults." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Although this Court has never ruled on the issue, lower courts also have upheld legislative restrictions on minors' liberty in the form of juvenile curfews. In upholding the constitutionality of juvenile curfews, courts have again relied on this Court's consistent refrain that minors' "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely," *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (quoting *Hodgson*, 497 U.S. at 444), and that juveniles lack the fundamental right in free movement. *Hutchins v. District of Columbia*, 188 F.3d 531, 538-39 (D.C. Cir. 1999) (en banc) (citing, *inter alia*, *Vernonia*, 515 U.S. at 654 and *Schall*, 467 U.S. at 265) and *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (citing, *inter alia*, *Vernonia*, 515 U.S. at 654).

Establishment Clause of the First Amendment, the Court in *Lee v. Weisman*, 505 U.S. 577 (1992), placed great emphasis on the "public pressure, as well as peer pressure," that such state-sanctioned religious practices impose on impressionable students. *Id.* at 593. The Court admonished that "[f]inding no violation under these circumstances would place objectors in the dilemma of participating [in the prayer], with all that implies, or protesting." *Id.* The Court stated it was not addressing whether the government could put citizens to such a choice when those "affected . . . are mature adults," rather than "primary and secondary school children," who are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id.* Similarly, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The Court stressed "the immense social pressure" on students "to be involved in the extracurricular event that is American high school football." *Id.* at 311. As the Court described it, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one," *id.* at 312, and, in the high school setting, "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* By contrast, the Court has upheld against an Establishment Clause challenge the delivery of prayers at the start of legislative sessions, where the audience that is present invariably is made up almost exclusively of adults. *Marsh v. Chambers*, 463 U.S. 783 (1983). *See Lee*, 505 U.S. at 597 (distinguishing between "atmosphere" at legislative sessions and public high schools).

Most recently, in this Court's landmark decision in *Roper v. Simmons*, 543 U.S. 551, 569-72 (2005), the Court relied in part on social science research on the developmental

differences of adolescents to hold that imposition of the death penalty on those who committed their offenses when under the age of 18 constitutes cruel and unusual punishment. Specifically, the Court noted that studies confirm that "a lack of maturity and an underdeveloped sense of responsibility are found in youth more than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Additionally, the Court noted that youth have less control over their own environment.[5] *Id.* at 569 (citing Laurence Steinberg and Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014

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[5] If Congress had intended for the MCA to apply to juveniles, it would have explicitly prohibited the imposition of the juvenile death penalty given that this Court struck down the juvenile death penalty as unconstitutional only one year prior to the enactment of the MCA. The MCA provides that an alien unlawful enemy combatant tried in a military commission may be sentenced to capital punishment. *See* 10 U.S.C. § 948d(d) ("A military commission under this chapter may...adjudge any punishment not forbidden by this chapter, including the penalty of death.."). Among other offenses, O.K. has been charged with "murder in violation of the law of war," which is punishable by death. 10 U.S.C. § 950v(b)(15). In *Simmons*, 543 U.S. at 561, this Court struck down the juvenile death penalty as violative of the 8th and 14th Amendments. The MCA was enacted in 2006 -- one year after the *Simmons* decision was issued. Yet, the MCA does not explicitly exempt juveniles from death penalty sentences. See 10 U.S.C. § 948d(d) (providing for the imposition of the death penalty without any exemption for juveniles); *but see* 10 U.S.C.A. § 979s (prohibiting the imposition of cruel or unusual punishments generally). The fact that the MCA does not mention juveniles at all, even in the provisions that provide for the imposition of the death penalty, which would be unconstitutional if applied to juveniles, supports O.K's contention that Congress did not intend for juveniles to be tried in the military commissions. *See* 10 U.S.C.A. § 948a-948c (describing military commissions generally, who is subject to them, and the scope of their jurisdiction without specifically mentioning juveniles).

(2003)).

In sum, in an unbroken line of decisions extending more than half a century, the United States Supreme Court has distinguished minors from adults under the law, noting that minors are, *inter alia*, (1) always in someone's custody and not at liberty to come and go at will; (2) less mature; (3) deficient in judgment and perspective; (4) more susceptible to the appearance or assertion of authority; (5) less able to think rationally in stressful situations; (6) less experienced and thus less knowledgeable; and (7) more malleable.

The Court's findings with respect to the developmental differences of teenagers in the critical realms of decision-making and judgment, in turn, are well-supported by a wide body of social science and medical research, as discussed in detail in Part II, *infra*.

B. Congress Has Differentiated Between Minors and Adults in the Criminal Context

Congress understands the need to treat children differently from adults in the criminal context. For example, the Juvenile Delinquency Act, 18 U.S.C. § 5031, *et seq.* ("JDA"), differentiates between adult criminal offenders and juvenile delinquents by setting forth specific procedures for the detention and prosecution of persons under the age of 18 , procedures that differ from those for the detention and prosecution of persons over the age of 18. The JDA specifically provides that juveniles shall not be prosecuted in a federal court unless (1) the state juvenile court (or other appropriate state court) lacks jurisdiction or refuses to exercise jurisdiction; (2) the state lacks "available programs and services adequate for the needs of juveniles"; or (3) the charged offense is a violent felony or a certain violation of the Federal Controlled Substances Act or Controlled Substances Import & Export Act, and there is a substantial federal interest

in exercising federal jurisdiction. 18 U.S.C. § 5032.

By setting forth in the JDA a special process and special procedures particular to the prosecution, detention and rehabilitation of juveniles, Congress clearly appreciated the need to treat juvenile offenders differently from adult offenders. For example, if a juvenile is adjudged delinquent, the JDA mandates that he not be "placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges," and "[w]henever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home or community." 18 U.S.C. § 5039. *See also In re Sealed Case*, 893 F.2d 363, 367-68 (D.C. Cir. 1990) ("[T]he Act's underlying purpose is to rehabilitate, not to punish, so as 'to assist youth in becoming productive members of our society [by] channel[ing] juveniles, for whom the criminal justice system is inappropriate, away from and out of the system into human problem-solving agencies and professions.' The Act is premised on the notion that it is in the best interest of both the juvenile and society that juveniles be insulated from the stigma associated with criminal trials, the publicity, the retributive atmosphere and the threat of criminal incarceration attendant to criminal proceedings.") (quoting S.Rep. No. 1011, 93rd Cong., 2nd Sess., 22 (1974), reprinted in U.S.Code Cong. & Admin. News 1974, p. 5286); *United States v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980)* ("The purpose of the Act, as amended in 1974, was to enhance the juvenile system by removing juveniles from the ordinary criminal justice system and by providing a separate system of treatment for them.") (citing S.Rep. No.93-1011, 93d Cong., 2d Sess., 22 (1974), reprinted in U.S.Code Cong. & Admin.News, p. 5283.); *Fagerstrom v. United States*, 311 F.2d 717, 720 (8th Cir. 1963) (stating that to be adjudged a juvenile delinquent and committed to custody is not to be convicted of

or sentenced for a crime, and "[t]he very purpose of the Act is to avoid the prosecution of juveniles as criminals").

II. RECENT SOCIAL SCIENCE RESEARCH SUPPORTS THE LONG-HELD VIEW THAT ADOLESCENTS ARE CATEGORICALLY DIFFERENT THAN ADULTS

This Court's holdings, as described in Part I *supra*, and federal legislation that take into account the developmental differences of adolescents are well-supported by the findings of social science research on the same. Empirical studies have established that youth are developmentally different from adults. This research confirms the wisdom in Congress's decision to not give military commissions convened pursuant to the Military Commissions Act (MCA) jurisdiction over youth such as O.K. In this Part, *amici* briefly describe the findings of social science research that undergird and legitimate all such legislative attempts to ensure that youth charged with criminal offenses are accorded special protections as compared to their adult counterparts.

First, the social research has demonstrated that youth, as compared to adults, are much less capable of controlling their criminal behavior and, consequently, they are less culpable than adults. Adolescents are often characterized as risk takers, more willing to take risks than adults and more likely to believe that they will avoid the negative consequences of risky behavior. Developmental psychology research supports this perception. Not only do adolescents prefer to engage in risky or sensation-seeking behavior, but, perhaps just as important, they may have different perceptions of risk itself. *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 260 (1996) ("The few extant comparisons of adults and

adolescents suggest that thrill seeking and disinhibition [as assessed via measures of sensation seeking] may be higher during adolescence than adulthood."). For example, adolescents appear to be unaware of some risks of which adults are aware, and to calculate the probability of positive and negative consequences differently than adults. The proven inability of juveniles as a class to appreciate the consequences of their actions, their propensity toward reckless behavior, their immature decision-making and, most importantly, their susceptibility to negative external influence, warrants different treatment of child soldiers than adult enemy combatants.

Moreover, adolescents are risk-takers who are more resistant to social control and less susceptible to deterrence. *See* Carl Keane et al., *Deterrence and Amplification of Juvenile Delinquency by Police Contact: The Importance of Gender and Risk-Orientation*, 29 BRIT. J. CRIMINOLOGY 336, 338 (1989) ("We suggest that those adolescents who are risk-takers will be more resistant to familial and formal control ...."). Issues of risk perception are closely related to those of temporal perspective, sometimes described as future orientation. Generally, adolescents tend to focus more on short-term consequences and less on the long-term impact of a decision or behavior. *See* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 231 (1995) ("In general, adolescents seem to discount the future more than adults and to weigh more heavily the short-term consequences of decisions--both risks and benefits--a response that in some settings contributes to risky behavior.") (citation omitted). This focus on the immediate makes some intuitive sense: adolescents have had less experience with long-term consequences due to their age and they may be uncertain about what the future holds for them.

Also, adolescents are more likely than adults to be influenced by others, both in terms of how they evaluate their

own behavior and in the sense of conforming to what peers are doing. *See* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615 (1979) (showing peak peer conformity at grade 9 between grades 3 and 12); Scott, *Evaluating Adolescent Decision Making* at 230. Because a majority of delinquent adolescent behavior occurs in groups, *see* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981), peer pressure may exert a powerful counterweight to the societal commands of the criminal law. Furthermore, peer involvement affects perceptions of the certainty and severity of sanctions. *See* Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. RES. CRIME & DELINQ. 123, 132 (1993) ("[A]n intelligent offender might be tempted to draw stronger conclusions about the certainty and severity of punishment from the cumulative experiences of friends than from his or her own relatively narrow life experiences."). O.K. is alleged to have acted with Al Qaeda, including attending an Al Qaeda training camp. In a group training camp environment, the peer pressure that affects juveniles far more severely than it affects adults, and is part of the juvenile's reduced culpability, is able to reign. But the MCA created no specific process by which the military commission could account for the effect of peer pressure on children or the unique characteristics of child soldiers discussed herein.

An adolescent's position in society is different from that of an adult, as reflected in legislation and case law cited in Part I of this brief. Adolescent autonomy is more restricted than that of adults, and minors are less integrated into the pro-social responsibilities, roles, and relationships of adulthood. Developmental psychologists have documented this reduced "stake in life." *See* Christopher Slobogin *et al.*, *A Prevention Model of Juvenile Justice: The Promise of Kansas v.*

Hendricks for Children, 1999 WIS. L. REV. 185, 199 (1999) Like adolescents' attitude toward risk and their foreshortened temporal perspective, this deficit may lead adolescents to underestimate the real costs of antisocial conduct. Stated another way, adolescents have had less exposure to the external constraints that create internal controls.

In addition, juveniles may be more prone to give false confessions when subjected to today's sophisticated psychological interrogation techniques. Studies have shown that juveniles do not understand the words of the *Miranda* warnings as well as adults, and do not appreciate the significance and function of *Miranda* rights. *See, e.g.*, Thomas Grisso, *Juveniles' Capacities to Waive Miranda Warnings: An Empirical Analysis,* 68 Calif. L. Rev. 1134-1166 (1980). Their low social status *vis-a-vis* their adult interrogators, societal expectations that they respect authority, and their naivete in believing that police officers would not deceive them, also may make them more likely to comply with the demands of their interrogators. *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents,* 32 Hofstra L. Rev. 463 (Spring 2004); *see also* Gerald Robin, *Juvenile Interrogation and Confessions,* 10 J. Pol. Sci. & Admin. 224, 225 (1982). Moreover, juveniles' immature decision-making abilities, as well as their limited time perspective, emphasis on short-term benefits versus long-term benefits, and willingness to take risks, *see* Thomas Grisso and Laurence Steinberg et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants,* 27 LAW & HUMAN BEH. 333, 353- 356 (2003), make them particularly ill-suited to engage in the high stakes risk-benefits analysis that is called for in the modern psychological

interrogation.[6]

Perhaps even more dramatic are studies of wrongful convictions, which demonstrate that juveniles falsely confess with some regularity. A study of 328 exonerations since the advent of DNA testing in 1989 found that fifty-one of the exonerations involved false confessions, fourteen of which involved defendants who were under 18 at the time of the crime. Samuel Gross *et al.*, *Exonerations in the United States, 1989 Through 2003* (April 19, 2004) at http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf. A second study by Professors Richard A. Leo and Steven A. Drizin documented 125 proven false confessions, 101 or 81 percent of which were false confessions to murder. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 947 (2004). Forty false confessors were juveniles, many of whom were juveniles aged 16 or older who confessed to murders. *Id.* at 945.

That juveniles may be more vulnerable to falsely confessing has also recently been accepted by John E. Reid and Associates, Inc., one of the nation's leading trainers of law enforcement in psychological interrogation techniques. In a recent memo sent to graduates of its training, Reid analyzed

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[6] There are no scientific studies proving definitively that juveniles are more likely to falsely confess than adults when subjected to psychological interrogation techniques. This is because it would be highly unethical to subject juvenile subjects to such stressful conditions for research purposes. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUMAN BEHAVIOR 141, 142 (April 2003). One recent study, however, which subjected juveniles to far less coercive circumstances than are at play in interrogations, found that juveniles were significantly more likely to accept responsibility for an act they did not commit than are adults, and that confronting juvenile subjects with false evidence of their guilt only increased the likelihood that they would do so. *Id.* at 151-52.

documented false confession cases and noted that the fact that a suspect is a juvenile "appear[s] with some regularity in false confession cases." John Reid & Associates, *False Confession — The Issues,* Monthly Investigator's Tips (April 2004), available at http://www.reid.com/investigatortips.html?serial=1080839438473936. To safeguard against false confessions, Reid instructed interrogators to "exercise extreme caution and care when interviewing or interrogating a juvenile..." *Id.* Specifically, Reid advised interrogators

> when a juvenile ... confesses, the investigator should exercise extreme diligence in establishing the accuracy of such a statement through subsequent corroboration. In these situations it is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession=s authenticity.

Id.

The scientific and sociological studies set forth above and that the *Simmons* Court found persuasive in demonstrating that juveniles were less mature and possessed less sense of responsibility (and therefore were less deserving of the death penalty) apply equally to child soldiers.[7] Juveniles'

[7] The Court cited the following articles and studies in its opinion: J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective,* 12 Developmental Review 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 Am. Psychologist 1009, 1014 (2003); E. Erikson, IDENTITY: YOUTH AND CRISIS (1968). In addition, there are numerous other studies that support the idea that the brain is not fully developed until at least age 25. *See* Elizabeth

heightened vulnerability to external pressure and their diminished control over their environment is particularly relevant to child soldiers who are recruited into battle. *Cf. Simmons* at 570 (recognizing that juveniles'"own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment"). Human rights and humanitarian organizations recognize that "c]hildren are uniquely vulnerable to military recruitment because of their emotional and physical immaturity"and "are easily manipulated and can be drawn into violence that they are too young to resist or understand." Human Rights Watch Fact Sheet, *Facts About Child Soldiers*, http://hrw.org/campaigns/crp/fact_sheet.html (last visited Aug. 13, 2007). Such organizations also recognize that the manipulation and recruitment to take up arms may come from family members, as was the case for O.K. *See* Coalition to Stop the Use of Child Soldiers, http://www.child-soldiers.org/childsoldiers/why-children-join (last visited Aug. 13, 2007) ("Family and peer pressure to join

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Cauffman and Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 *Behavioral Sciences and the Law* 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, *Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88(1) Journal of Criminal Law and Criminology 137, 137-189 (1997); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21(22) The Journal of Neuroscience 8819, 8819-8829 (2001); National Institute of Mental Health, *Teenage Brain: A Work in Progress, A Brief Overview of Research Into Brain Development During Adolescence*, NIH Publication No. 01-4929 (2001); Kristen Gerencher, *Understand Your Teen's Brain to be a Better Parent*. Detroit Free Press, Feb. 2, 2005; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

up for ideological or political reasons or to honour family tradition may also be motivating factors.").

There is also strong social science evidence to support the notion that children generally have a greater capacity to rehabilitate than adults. *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in YOUTH ON TRIAL: A DEVELOPMENTAL PROSPECTIVE ON JUVENILE JUSTICE 23 (Thomas Grisso & Robert G. Schwartz, eds., 2000) ("the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult"); John H. Laub and Robert J. Sampson, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70 (2003) (presenting lives of adjudicated delinquent and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and depended in many instances upon aspects of their adult lives). The *Simmons* Court found that the "reality that juveniles still struggle to define their identity means it is less supportable to conclude even a heinous crime committed by a juvenile is evidence of an irretrievably depraved character" and, therefore, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. As juveniles mature into adults, "the impetuousness and recklessness that may dominate in their younger years may subside." *Id.* For this reason, child soldiers are more amendable to rehabilitation and reintegration into society than their adult counterparts.

In sum, the growing body of social science scholarship set forth above attests to the developmental differences between adolescents and adults - differences that have been recognized by this Court and Congress. Given that it is widely understood in our legal tradition that adolescents are

categorically different than adults, it would be absurd to impute miliary commission personal jurisdiction over juveniles based on the MCA's silence with regard to juveniles.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center *et al.*, respectfully urge this Court to grant Petitioners' request for relief.

Respectfully submitted,

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APPENDIX A

IDENTITY OF *AMICI CURIAE*

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Northwestern University School of Law's** Bluhm Legal Clinic has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center** (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty

members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Children & Youth Law Clinic** (CYLC) is an in-house legal clinic, staffed by faculty and students at the **University of Miami School of Law**, which advocates for the rights of children in a variety of legal proceedings. Founded in 1995, the CYLC has appeared as amicus curiae in numerous federal and state court cases implicating significant due process, human rights and therapeutic interests of children in the custody of the state and federal governments. The CYLC provides legal representation to children of all nationalities in a range of legal proceedings, including state child protection and federal immigration and civil rights cases. The CYLC works to ensure that children receive protection from acts such as exploitation, arbitrary detention and unwarranted removal from parental care, consistent with international human rights standards governing the treatment of children by the State. We believe that courts should recognize the unique developmental characteristics of children, including their immature decision-making abilities, susceptibility to negative external influences, and capability for reform, should assure their fair treatment, and promote their best interests in all legal proceedings where their interests are adjudicated.

The **Barton Child Law and Policy Clinic** at **Emory University School of Law** was founded in March 2000. Barton was originally established to address the need in Georgia for an organization dedicated to effecting systemic policy and process changes for the benefit of the children in Georgia's child welfare system. In 2006, Barton was expanded to include a direct representation clinic known as

the **Juvenile Defender Clinic** (JDC) for those children charged with delinquent and unruly offenses.

The JDC provides a clinical experience for third year law students in the juvenile court arena. The focus of the clinical experience is to provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring that courts make decisions informed by the child's educational, mental health and family systems objectives. The JDC believes that children should be treated appropriate to their developmental status and wherever possible in their home environment. JDC believes that courts should not be used as a broker for those services that should be systematically provided by schools, medical professionals and family support systems. The JDC at Barton is a clinic supported in its entirety by the Emory University School of Law. Legal services are provided at no cost to its clients.

Legal Services for Children (LSC) has been providing holistic legal services to children and youth in the San Francisco Bay Area since 1975. LSC employs a multidisciplinary model of representation, utilizing teams of attorneys and social workers to serve the complex needs of our minor clients. This model is based upon the premise that children are developmentally different from adults, and that legal representation and treatment should be individually tailored to account for the unique needs and competencies of each child. LSC fully supports the foundational principle supporting a separate juvenile court, recently reiterated by the Supreme Court in Roper v. Simmons: the constitution requires courts exercising jurisdiction over children to take into account their unique characteristics as juveniles. These principles should apply with equal force in military tribunals.

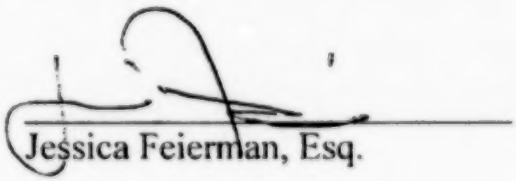
The **Mid-Atlantic Juvenile Defender Center** (MAJDC) is a multi-faceted juvenile defense resource center

that has served the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia since 2000. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes research and policy development throughout the region by conducting state-based assessments of juvenile indigent defense delivery systems. Following the assessment, MAJDC staff work to ensure the report is used to educate the public about issues related to the delivery of indigent defense services for juveniles and assists the public defender systems in responding to assessment recommendations. MAJDC also responds to the needs of juvenile defenders by coordinating training programs, providing technical assistance and maintaining a list-serve of juvenile defenders to respond to defender questions. MAJDC is a 501 (c)(3) non-profit organization.

The **National Association of Counsel for Children** (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal services to children, families, and agencies; advance the rights and interests of children; and develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States.

CERTIFICATE OF SERVICE

I, Jessica Feierman hereby certify that this 24th day of August, three copies of the Motion of Juvenile Law Center, *et. al.* for Leave to File an *Amicus Curiae* Brief in Support of Respondent Omar Khadr, and Brief of Juvenile Law Center, *et. al.* have been served, via first class mail on all counsel of record in this appeal as follows:



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